IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 165 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
AND
HON'BLE MR.JUSTICE BANKIM.N.MEHTA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

MOHANBHAI TULSIBHAI - Petitioner(s)
Versus
STATE OF GUJARAT - Respondent(s)

==========

Appearance :
MR BM MANGUKIYA for Petitioner No(s).: 1.
MR AJ DESAI, APP for Respondent No(s).: 1.

==========

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
HON'BLE MR.JUSTICE BANKIM.N.MEHTA

Date : 26/10/2005

CAV ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

This appeal under Section 374 of the Code

of Criminal Procedure, 1973 challenges the judgment and order dated 31.12.1996 of the learned Additional City Sessions Judge, Ahmedabad convicting the appellant of the offence punishable under Section 302 IPC for causing the death of appellant's wife Hiraben and sentencing the appellant to undergo life imprisonment and also to pay a fine of Rs.1,000/-, in default RI for three months.

2. The appellant was charged for the offences punishable under Sections 302 and 498A IPC and also for the offences punishable under Sections 3 and 4 of the Dowry Prohibition Act on the ground that deceased Hiraben was being ill-treated by her husband (the appellant) who was asking the deceased to bring dowry from her parents' place; that on 28.12.1995, the appellant caused the death of Hiraben and thereby committed the offence punishable under Section 302 IPC. The prosecution case was that at about 8.30 PM on 28.12.1995, the appellant had demanded a sum of Rs.5,000/- and deceased Hiraben had refused to bring any money on the ground that earlier also

she had brought the dowry. The appellant thereupon lost his temper and gave two fist blows and one kick blow on the abdomen of the deceased and immediately thereafter poured kerosene on the deceased and set her on fire. At that time, the elder son (of the appellant and the deceased) who was present there immediately rushed to the place of the mother of the deceased and told her about the incident and thereupon Kankuben, mother of the deceased, immediately rushed to the scene of offence and she saw the deceased lying on the floor with burns and that the mother as well as the brother of the deceased rushed the deceased to the Civil Hospital at about 9.10 PM same evening. The dying declaration of the deceased was recored at the hospital by an Executive Magistrate at 00.45 AM in early morning. Ultimately, after three days, the deceased succumbed to the burn injuries on 1.1.1996 at 7.30 AM. The appellant was charged for the aforesaid offences. The appellant pleaded not guilty.

3. At the trial, the prosecution led the

following evidence including the witnesses to prove the dying declaration and First Information Report:-

(i) The prosecution examined the Executive Magistrate PW 1 at Exh. 8 (page 27). The Executive Magistrate stated that upon receiving the wardi from the Naroda Police Station on the night between 28 and 29th December, 1995, the witness had gone to the Civil Hospital and started recording dying declaration at 00.45 hours in the morning of 29.12.1995. The patient was conscious and was able to understand the questions being put to her by the witness and she was making conversation in a normal manner. The witness recorded the declaration in the question-answer form and whatever answers the patient gave, the witness recorded in his own hand writing. Since the patient had injuries on right hand, her left hand thumb impression was taken on the declaration. Thereafter

the witness put his signature and date on the dying declaration. The original dying declaration was produced at Exh. 10. (page 145).

(ii) The prosecution examined PW 10 Dr Grishma Divyank Patel, CMO at the Civil Hospital in the casualty ward who recorded the history of burns at Exh. 33. She stated that the patient was conscious when she was admitted at 9.10 PM and she gave the history of burns (sustained at 8.30 PM) which the witness recorded as per the patient's say in the case papers. The witness recorded the history in her own handwriting in the case papers which are produced at Exh. 33. Thereafter, the witness referred the patient to Dr VC Doshi in the female surgical ward. The case papers at Exh. 33, inter alia, contain the case paper in the handwriting of Dr Grishma Divyank Patel wherein the following history is recorded :-

> “Mara gharwala e paisa mate kerosene redine mane bali chhe.”
>
> (for the sake of money, my husband has set me on fire after pouring kerosene)

(iii) The prosecution also examined PW 11 Dr Rajesh Dhirajlal at Exh. 35 who recorded the history of the patient and treatment given to the patient in the unit of Dr BC Doshi. Dr Rajesh stated that the patient was conscious and was able to speak. He further stated that the case papers at Exh. 33 except OPD papers were written in his handwriting. The said papers contain the following history :-

> “Patient conscious. History given by self.
>
> Mara pati e mane kerosene chhanti salgavi didhi.
>
> (My husband sprinkled kerosene on me and set me on fire)
>
> At : Thakkar nagar Nr. Bapulagar Ahmedabad
>
> on 28.12.95
>
> at 8.30 PM”

This witness stated that there were 45% burns on the body of the deceased including chest, abdomen and face. The witness denied the suggestion the pain killer given to the patient contained sedative. The witness also denied that the patient was not in a position to speak.

(iv) The prosecution also recorded the evidence of PW 9 Police Constable Gautam Maganlal at Exh. 30. He was on duty at the Civil Hospital from 8.00 PM on 28.12.1995 to 8.00 PM on 29.12.1995 He sent the wardi (Exh.21) at 9.20 PM stating that as per the instructions from Dr Girishmaben, CMO, Civil Hospital, he sent the wardi that when Hiraben Mohanbhai, aged 28 years was present at her house at 8.30 PM on 28.12.1995; after quarrelling about money, her husband poured kerosene and set her ablaze. Hence, Hiraben

sustained burn injuries and was admitted for treatment at the Civil Hospital Ahmedabad at 9.10 PM upon being brought to the Civil Hospital by her brother Himatbhai Mohanbhai Parmar.

(v) The prosecution also examined PW 2 Kankuben Mohanbhai at Exh. 11. The said witness was the mother of the deceased. Brother of the deceased PW 3 Himatbhai was examined at Exh. 12 and panch witness Pradip was examined at Exh. 13 to prove the panchnama at Exh. 14 which was the panchnama of the scene of offence. The Investigating Officer Exh. 15 and the doctor (Exh.18) who carried out the post-mortem were also examined.

4. In his further statement under Section 313 of the Cr.PC., the appellant - accused denied the commission of the offence. After considering the evidence on record, the learned Sessions Judge acquitted the appellant of the offence punishable under Section 498 A IPC and also acquitted the

appellant of the offence punishable under Sections 3 and 4 of the Dowry Prohibition Act. However, the learned Sessions Judge convicted the appellant of the offence punishable under Section 302 IPC and sentenced him to life imprisonment. The present appeal is directed against the said judgment.

5. Mr Mangukiya, learned counsel for the appellant submitted that the prosecution evidence suffered from several infirmities and contradictions and the thrust of his arguments was that the accused was falsely implicated because the brother of the deceased was an advocate. It was also submitted that since the deceased had mentioned in her dying declaration that she was alone in the house, the prosecution case that the elder son of the deceased informed the mother and brother of the deceased cannot be believed.

It was submitted that while drawing the panchnama the place of incident was changed by the Investigating Agency. If the incident had

taken place in the room as indicated in the panchnama Exh. 14, the other things in that room like cradle and two beds would also have got fire. It was also submitted that the arrest panchnama at Exh. 24 shows that the appellant had burn injuries on his right hand fingers and the writ and as also mentioned in the arrest panchnama, the appellant had stated that burn injuries were received while smothering the flames on the body of the wife. It was, therefore, submitted that the appellant had not set the deceased on fire, but on the contrary had tried to save the deceased.

6. On the other hand, Mr AJ Desai, learned APP submitted that in view of the clinching evidence of the medical history recorded by PW 10 Dr Girishma Patel at 9.10 PM and also the medical history in the handwriting of PW 11 Dr Rajesh Dhirajlal immediately after being admitted to the hospital followed by the dying declaration at Exh.10 recorded by the Executive Magistrate at 00.45 AM, there was no scope for doubting the prosecution case that it was the appellant-

accused who had set the deceased on fire after pouring kerosene on her at 8.30 PM on 28.12.1995. It was further submitted that since the incident had taken place within seven years of the marriage between the accused and the deceased, even otherwise the presumption was against the accused. It was also submitted that after setting the deceased on fire, the accused had run away as clearly deposed by the mother of the deceased and that the appellant was arrested after three days i.e. on 1.1.1996 at 8.40 PM and that the appellant had not led any evidence to show that he had received injuries at the time of the incident on 28.12.2995 and that the burn injuries were not subsequently self inflicted by him during those three days.

It was also submitted that there was no question of changing the scene of offence and that after the deceased was set on fire, the mother (PW 2) had reached the scene of offence very soon as the elder son of the deceased had called the mother of the deceased residing nearby and, therefore, the deceased could come out of

the house immediately after the accused left and, therefore, there was no question of any impact of fire on the other articles in the house.

8. Having heard the learned counsel for the parties, we are of the view that the learned trial Judge did not commit any error in holding that it was the appellant-accused who had set the deceased on fire after pouring kerosene on her. Since the appellant was acquitted of the offence punishable under Section 498A IPC and Sections 3 and 4 of the Dowry Prohibition Act, and since there is no acquittal appeal, it is not necessary to discuss that part of the prosecution case, but it clearly transpires from the record that the appellant used to raise quarrels with the deceased. After the incident which took place at 8.30 PM, the deceased was immediately rushed to the hospital by her mother (PW 2) and brother (PW 3) who were residing nearby at 9.10 PM. Immediately on admission into the casualty ward, Dr Girshma Patel recorded the history given by the deceased clearly mentioning that for money's sake, she was set on fire by her husband (the

appellant) after pouring kerosene. Apart from that history recorded by Dr Girishma Patel in the casualty ward, when the deceased was shifted to the surgical ward of Dr BC Doshi, the deceased repeated the same history which came to be recorded by Dr Rajesh Dhirajlal wherein also the deceased stated that her husband had poured kerosene on her and set her on fire. In view of the history given by the deceased, Dr Girishma Patel had also immediately informed PW 9 Police Constable Gautam Maganbhai who was on duty at the Civil Hospital. The constable sent the wardi Exh. 21 at 9.20 PM which also specifically stated that her husband (the appellant) had poured kerosene and set her ablaze. The dying declaration at Exh. 10 recorded by PW 1 Executive Magistrate Ranjitisinh Gohil puts the issue beyond any doubt whatsoever. In the said dying declaration, the deceased had given clear account of the incident in her conscious state of mind. Both Dr Girishma Patel and Dr Rajendra Dhirajlal had clearly stated that the patient was conscious. The Executive Magistrate had also clearly mentioned at the bottom of the dying

declaration that the opinion of the doctor was taken about the physical and mental condition of the deceased while recording the dying declaration between 00.45 and 01.05 AM i.e. within five hours from the time of the incident.

9. We will now deal with the contention that since in her dying declaration, the deceased had stated that she was alone and nobody else was around, that would create doubt about the prosecution case that the elder son of the deceased went and informed the mother and brother of the deceased. The statement that there was no one else and that the deceased was alone was in response to question No. 10 as to who was present in the house at the time of the incident. But the deceased had already stated in response to question No. 8 as to who were residing in the house, “two of us – wife and our two children”, which meant that the reply of the deceased was that there was no one else and only the deceased was present; the deceased did not even refer to her husband in response to question No. 10. However, while describing the incident in

response to question No. 12, the deceased clearly stated that the husband entered the house in drunken condition at 8.30 PM and demanded money and when she refused to again ask for money from her parents, the accused got annoyed, slapped the deceased and kicked her in the abdomen, took the kerosene from the carbuoy and poured on her and lighted a match stick. Thereafter the accused ran away after bolting the door from outside. When the deceased was being beaten up, her elder son had gone out to call her mother and thereafter the mother came and opened the door and put out the fire. Thus, the deceased herself had given description of the incident wherein she made a reference to her elder son. Hence, the reply to question No. 10 cannot be considered in isolation and it only meant that the deceased was alone in the room when the husband came and the incident took place. That does not rule out the presence of the elder son in another room or just outside the house. Therefore, the elder son naturally noticed the deceased being beaten up by the appellant.

10. We do not also find any substance in the contention about the change in place of incident since the deceased had come out of the room very soon as her mother arrived immediately at the house, there would be no impact of fire on the other articles in the house.

11. In view of the above discussion, it is clear that it was the appellant who poured kerosene on the deceased and set her on fire and thus he is guilty of culpable homicide.

12. Mr Mangukiya, learned counsel for the appellant, however, submitted that the appellant himself had sustained burn injuries as mentioned in the arrest panchnama at Exh. 24 and that the appellant had also stated that he sustained those injuries while trying to save the deceased which indicated that even the injuries caused on the deceased were not premeditated but the act was committed, even as per the prosecution case, in a fit of anger. Hence, the case would fall under Exception 4 to Section 300 and, therefore, the case would fall under Section 304 IPC.

13. We have carefully considered the aforesaid submission. If the appellant had committed the act in a fit of anger and had really tried to save the deceased, the appellant would not have fled out of the house after bolting the door from outside and he would have certainly joined the mother and brother of the deceased for taking the deceased to the hospital. The arrest panchnama at Exh. 24 in which the appellant is shown to have burn injuries on his right wrist and fingers was drawn on 1.1.1996 at 9.40 PM. That means the accused had absconded for four days. This act of not being available itself makes alleged burn injuries on the wrist and fingers of the accused as suspect. If the accused had really tried to save the deceased, the burn injuries would be found on both the hands. Apart from that, this very act of absconding for four days and the mother of the deceased having found the accused running away after bolting the door from outside, when the deceased was in flames inside the room, rules out the applicability of Exception 4 because even if

the act was not premeditated and was done in a fit of anger, setting the deceased on fire which resulted into burn injuries and in turn death of the deceased are sufficient to take the case out of Exception 4 which reads as under :-

> "Exception 4. Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.
>
> Explanation " It is immaterial in such cases which party offers the provocation or commits the first assault.

Burning the deceased was certainly acting in a cruel manner.

14. The argument that the accused was framed because the brother of the deceased was an advocate is stated only to be rejected.

15. In view of the above discussion, we find no merit in any of the contentions urged on behalf of the appellant.

The appeal is, therefore, dismissed.

[M.S. SHAH, J.]

[BANKIM N. MEHTA, J.]

sundar/-